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ABSTRACT

The Office of Civil Rights is faced with a myriad of problems concerning discrimination on college campuses. The problems range from cases concerning racial discrimination to sex discrimination in both student body and faculty makeup. Therefore, a series of affirmative action plans have been stipulated for those colleges and universities who are indeed underutilizing minority group members in their staffing. The academic community generally view the affirmative action component as an impersonal, statistical approach to hiring and promotion and as being detrimental to the maintenance of high academic standards. Women and minorities, on the other hand, see the affirmative action component as constituting the most effective way of ensuring that historic and cultural biases about the role and capabilities of women and minorities do not color the decisions that effect their opportunity for employment and advancement in the academic world. (HS)

REMARKS BY

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AT

PANEL ON AFFIRMATIVE ACTION AND FACULTY POLICY

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

NEW ORLEANS, LOUISIANA

MAY 5, 1972

8:30 PM

Mr. Chairman, Ladies and Gentlemen:

I am sincerely pleased to have the opportunity to talk with you today about some of the policies, problems, and prospects we in the Office for Civil Rights are facing in our compliance program at colleges and universities throughout the country. In discussing our program, the place to begin, I believe, is with a brief description of the kinds of problems which our office and concerned members of the higher education community find existing today.

Examples of the problems are not difficult to find.

Arthur Fletcher, the former Assistant Secretary for Labor who spear-headed the development of the current affirmative action requirement, has often told a moving story about his mother, who was forced to support her family through employment as a domestic worker even

though she had two college degrees.

Or we might look at a New England university where women comprise 51% of all those graduating with honors (and 40% of those with highest honors), yet where the faculty is less than 11% female and the junior faculty less than 28% female. How does this university's record of many years of graduating women qualified by its own standards square with its contention that it now cannot find qualified women? That same university, incidentally, four years ago instituted an ambitious "upward bound" program for disadvantaged freshmen students yet made no provisions for accommodating female students and accepted no women into the program.

We might ask why it was necessary for our office to have to act to help cause the reinstatement of a black chemistry professor on a West Coast campus who had been dismissed with questionable due process after he was bold enough to speak out on controversial issues.

This case, incidentally, is particularly interesting to note in light of recent criticism in some quarters that the Executive Order threatens to erode academic freedom.

What conclusions should be drawn at a mid-western university which reported to HEW a smaller percentage of women on its faculty now than at the turn of the century?

What should be done in a situation where a woman faculty member and male faculty member in a mid-western college were married and, simply by virtue of the marriage, the woman was required to suffer a loss in salary, a changed job description, and a loss of important fringe benefits, while her husband experienced no change in his employment status or pay?

What equities operate to justify an institution's payment to female maids of considerably less money than the amount paid male janitors, even where the record

indicates that both job categories perform essentially the same kind of work? Or is it really surprising that our office should take enforcement action where, in the course of a review, it finds personnel records and resumes of women applicants who were rejected with notations by the responsible department head that "we have enough of these", and "sorry, but we have filled our women's quota"?

How do we and college administrators deal with the frequent letters we see from one department head to another beginning "We are looking for a bright young man..."? And what are we to say to a women faculty member of an upstate New York university who testifies that she received less favorable health insurance and retirement plans than some of the wives of male faculty members?

These are only a few cases, but unfortunately, they are not isolated or exhaustive, as many more anecdotes would indicate, and as broader statistical trends verify.

The number of female college presidents at non-Catholic schools, for instance, has dwindled to less than 20, prompting one woman to note that women presidents are now fewer than the almost-extinct whooping crane. The female median income was 64% of the male rate in 1956; it was down to 58% 10 years later. In 1899 53% of all bachelors degrees went to women; today they receive about 40%.

We must acknowledge, of course, that the trends of reduced comparative participation by women in higher education cannot be explained solely on grounds of invidious discrimination. For years, professional opportunities for women were limited largely to education, while more recently professional positions have opened up somewhat in other areas of professional life. There are indications, also, that as higher education opportunities have been extended to lower income families able to support one or two children at most,

such families have frequently supported the male members of their families instead of the women. Other factors may also enter the picture to explain these trends, but one should take small comfort from any of them. The fact remains that the opportunities for women in most areas of professional life are still to be characterized more by their limitations on grounds of sex discrimination than by their availability on grounds of merit. Law firms, architect firms, and most executive suites rarely provide women and minorities positions of responsibility commensurate with their availability and capability.

Attempting to sort out and correct the causes of discrimination in any field has never been an easy or unanimously approved task. In the past several months, we have seen a continuing debate on the campuses about these issues and particularly about the equal employment opportunity requirements of universities and colleges holding Federal contracts.

It has been argued, for example, that the enforcement of the law against discrimination in colleges and universities will somehow compromise what has been described as the egalitarian principle of professional and scholarly excellence upon which our universities were founded and have flourished. It has been argued that the traditional prerogatives of departments and faculties will be compromised by the imposition of Federal requirements in the hiring and promotion of faculty. It has been argued, in summation, that unless HEW is stopped in its enforcement efforts, the University as we know it today will be compromised if not actually destroyed.

These issues are serious ones, and the concerns expressed by responsible members of the academic community cannot be dismissed without explanation. I am convinced, however, that the spectre of lost autonomy

and diminished quality among faculties is one which has obscured the real objective of the law against discrimination: that is, to ensure equal opportunity to all persons regardless of their race, sex, religion, color or national origin, and to enhance the opportunities available to groups of persons previously excluded.

The question, then, is not whether institutions of higher education ought to make special efforts to involve those who have been traditionally excluded from employment or educational opportunity. As a matter of law, all institutions which benefit from taxpayer-financed contracts have an obligation to make these efforts on behalf of the entire public which supports them. But the law, so we are taught, has a spirit as well as a letter. And in the last two decades, perhaps no group has sought more to advocate the real, concrete fulfillment of the law's spirit of equality of opportunity than have the faculties of our great colleges and universities.

Clearly, when this issue comes close to home, the academic community's response should not be to refuse to participate, or even to ask whether it should participate. The response must be to seize the opportunity to translate advocacy into results with a vigor and commitment that will lead the community at large.

Executive Order 11246, which prohibits discrimination on grounds of race, sex, color, national origin and religion by Federal contractors, has been the focus of most of the debate within the academic community in the past year. This Order embodies two concepts: nondiscrimination and affirmative action.

Nondiscrimination requires the elimination of all remnants of discriminatory treatment, whether purposeful or inadvertent. Affirmative action requires the contractor to go beyond a purely passive stance of not discriminating by requiring him to seek to employ members of groups which have traditionally been excluded, thereby

mitigating the effect of discrimination in society at large. The premise of the affirmative action concept of the Executive Order is that systemic discrimination in employment has existed, and unless positive action is taken, a benign neutrality today will only preserve yesterday's conditions and project them into the future.

The affirmative action concept requires a contractor to determine whether women and minorities are "under utilized" in its employee workforce and, if that is the case, to develop as a part of its affirmative action program specific goals and timetables designed to overcome that underutilization. Underutilization is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability." This underutilization is distinguished from a lack of representation resulting from discriminatory employment decisions by the contractor himself. In other words, a contractor must not only

remedy identified discrimination against a particular person or group, but must also, if that group is not fairly represented in his workforce, direct good faith efforts to increase their number.

The affirmative action concept in the Executive Order is one of the special characteristics which distinguishes it from other anti-discrimination legislation. It has been a well-publicized source of consternation to some within the academic community who believe that it is an impersonal, statistical approach to hiring and promotion and, as such, is deterimental to the maintenance of high academic standards.

Women and minorities, on the other hand, see the affirmative action component of the Executive Order as constituting the most effective way of ensuring that historic and cultural biases about the role and capabilities of women and minorities do not color the decisions which effect their opportunity for employment and advancement

in the academic world. Affirmative action is the best, if not the only, way of combatting the effects of broad-based discrimination against qualified minorities and women.

In reality, statistical information about the relative availability of women and minorities in the labor force is only one factor to be considered in assessing whether an institution has acted positively to provide all qualified persons with an equal opportunity for employment and advancement. The Office for Civil Rights does not conclude that an institution has discriminated or is out of compliance solely because it does not have a "balance" of women and minorities in a particular job category or department. It will require, as it has in the past, that where women and minorities are not present in numbers which might be expected by their general availability in the area from which the institution may reasonably recruit, then genuine and

tangible efforts must be made to locate them and encourage their candidacy. We are equally concerned, of course, to see that these efforts are productive.

Similarly, where few women and minorities are found in the upper ranks of the administration or faculty, it is the responsibility of the Office for Civil Rights to inquire into the situation, to determine whether this has resulted from policies or practices which unfairly deny full opportunity to qualified women and minorities. In short, we are not in a "numbers game." We do believe, however, that statistical evidence of gross deficiencies can serve as an important indicator to the university as well as our office that the policies and practices of that department ought to be carefully examined.

The requirement of goals and timetables to remedy discrimination or underutilization has also been the subject of some debate, exaggeration and distortion.

The confusion seems to center on just what goals mean, and particularly whether they are rigid levels of employment referred to usually as "quotas." In the field of contract compliance, goals do not function as quotas, and the difference between the two is not semantic.

Quotas, on the one hand, implies a numerical level of employment that must be met if the employer is not to be found in violation of the law. If quotas were required, they would be rigid requirements, and their effect would be to compel employment decisions to fulfill them, regardless of the compromising effect fulfillment might have on legitimate qualifications and standards, regardless of the good faith effort made to fulfill them, even where the results were to fall short of the mark, and regardless of the fact that quotas might have been set by arbitrary standards unrelated to the availability of capable applicants and the potential of the contractor to recruit them.

Goals, on the other hand, signify a different concept and a different employment process. They are projected levels of achievement resulting from an analysis by the contractor of his deficiencies, and of what he believes he can do about them if he really tries. Establishing goals signifies both that the contractor has made such an analysis, and that he has, as a result, committed himself to a process likely to ensure that he will undertake those good faith efforts of which he is capable.

In contrast to the use of quotas, the achievement of goals does not become the sole or even primary measurement of a contractor's compliance. Good faith efforts remain the standard of compliance set by the Executive Order; goals remain as a barometer of good faith performance for the contractor and the compliance agency to use. If the contractor falls short of his goals at the end of the period or timetable he has set,

that failure in itself requires not a conclusion of noncompliance, but a determination by the contractor as to what went wrong. If it appears that the cause for failure was the setting of goals which later proved unrealistic in light of changed employment market conditions, or the like, but the record discloses that the contractor's program of good faith efforts was followed, he has complied with the letter and spirit of the Executive Order. When used correctly, goals are merely an indicator of probable good faith achievement, not a rigid or exclusive measure of performance.

I should emphasize that nothing in the Executive Order requires that a university contractor eliminate or dilute standards which are necessary to the successful performance of the institution's educational and research functions. The affirmative action concept does not require that a university employ or promote any person who is less qualified to a position than other applicants or employees who are competing for that position. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless, of course, it can somehow be demonstrated that such criteria are essential to successful performance in the particular position involved and necessary to the educational and research functions of the institution.

It also requires that genuine and effective efforts be made to locate and recruit qualified members of those groups which have previously been excluded

from opportunities for employment or advancement. Further, reasonable efforts must be made by the institution to eliminate any obstacles within its structure or operation which have prevented certain groups from securing the qualifications necessary to meet the institution's standards for employment.

The impact of the requirements set forth in the Executive Order and its implementing regulations on college and university employment policies, and particularly in the faculty area, is certain to be profound.

In the first place, universities have developed in a curiously decentralized manner which difuses authority and responsibility for personnel matters through a number of levels. All of you are no doubt aware of the provision in the 1966 Statement on Government of Colleges and Universities which states that "Faculty status and related matters are primarily a faculty responsibility."

In the second place, a great many colleges and universities have been slow to develop systematic ways of keeping track of who is in their employment ranks. Matters such as recruitment and hiring policy have in many institutions been implemented on an ad hoc basis, and the grounds for making decisions as to who will go and who will stay are not always susceptible to measurement.

In the third place, institutions of higher education have been singularly reluctant to admit any sort of external influence on the policies and practices which govern their operations and their faculties in particular. While this reluctance may be rooted in an understandable skepticism about the corrosive influence of any outside institutions--private, quasi-public or governmental--certainly there should be agreement that this fear cannot be so generalized and overstated as to perpetuate the exclusion of qualified

women and minorities, or relegate them to a low status and pay on the basis of cultural stereotypes and assumptions.

Another point which has been raised in the context of the debate to which I have referred is the matter of the effect of the affirmative action concept and the enforcement actions of the Office for Civil Rights on the exercise of academic freedom. Frankly, I fail to see how enforcement of the Executive Order or the implementation of an affirmative action plan can be construed as an interference with academic freedom. The equal employment opportunity concept does not imply interference with the freedom of teachers to conduct research, to publish their results, to teach their subjects in the classroom, or to discuss any subject or take a position on any matter inside or outside the classroom. It does not presume to interfere with faculty members' responsibilities to their subjects,

to their students, to their professions, to their institutions, to their communities or to society.

I have never understood academic freedom to include the freedom to deny a qualified person an opportunity for appointment or advancement because of race or sex, or the right to pay one person less than a person of another race or sex performing the same job.

Neither do I understand academic freedom to be a justification for making faculties into men's clubs, entrenched in their "old boy" methods of recruitment, prejudiced in their highly personalized, subjective judgments on tenure and promotion, and irrationally resistant to the prospects of any change in the university's employment policies.

In short, I simply do not understand the reluctance with which too many university administrators and faculties have undertaken to [illegible]

and profiles, to determine whether discrimination exists and how it may best be remedied. Surely it is no violation of academic freedom to seek redress for years of admitted employment injustice.

All of us in the Office for Civil Rights hope that the community of higher education will join us in viewing the requirements of the Executive Order not as a threat to the principle of selection on the basis of merit, or to the autonomy of the academic community, but as furthering the goals which the overwhelming majority of that community has honestly articulated for years. We hope that institutions of higher education will use the ingenuity and expertise in devising remedial programs which they have readily applied to other areas of endeavor. Universities have business administration and management expertise which could design programs voluntarily, promptly, and clearly sufficient to meet legal requirements. Many offer courses in equal

employment opportunity. Many of their faculties advise private industry on these very same issues. The efforts which have gone into the search for hidden talent and diversity in freshman classes are ready for translation into searches for hidden talent and diversity on faculties and staffs.

Notwithstanding these considerations, we have seen much agonizing over the equal employment opportunity requirements in colleges and universities. I am reminded of the statement of an equal employment officer for the U. S. Post Office Department. Several years ago the postmaster of a southern city said he just didn't know how he could possibly comply with the equal opportunities requirements without "discrimination in reverse." The equal opportunity officer, who was black, simply said: "Try, Mr. Postmaster, to use as much ingenuity in getting us in as you have used in keeping us out."

[illegible] new ideas, this does not seem to us to be an unreasonable task.